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No. 92-1745

Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES,
OCTOBER TERM, 1992

VERNON R. JANTZ, Petitioner

v.

CLEOFAS F. MUCI, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

VERNON R. JANTZ, Plaintiff-Appellee, vs. CLEOFAS F. MUCI, Defendant-Appellant.	No. 91-3245
LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.; AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF KANSAS; NAT. CONFERENCE OF GAY AND LESBIAN ELECTED OFFICIALS, Amici Curiae.	

APPEAL FROM THE UNITED STATES DISTRICT COURT OF KANSAS
(D.C. NO. 89-1628-K)
(759 F. Supp. 1543)

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James S. Phillips, Jr. of Phillips & Phillips, Wichita, Kansas for Plaintiff-Appellee.

Stephen V. Bomse, Clyde J. Wadsworth, of Heller, Ehrman, White & McAuliffe, San Francisco, California, and Mary Newcombe, Los Angles, California, for amicus curiae Lambda Legal Defense and Education Fund, Inc.

Eric E. Davis, of Saperstein, Mayeda, Larkin & Goldstein, Los Angeles, California for amicus curiae National Conference of Gay and Lesbian Elected Officials.

William B. Rubenstein, Matt Coles, Ruth E. Harlow, of American Civil Liberties Foundation, New York, New York, and David J. Waxse, of Shook, Hardy & Bacon, Overland Park, Kansas, for amicus curiae American Civil Liberties Union Foundation and the American Civil Liberties Union of Kansas.

Before BALDOCK AND BARRETT, Circuit Judges, and PARKER, District Judge.*

BALDOCK, Circuit Judge.

Plaintiff-appellee Vernon R. Jantz

brought this 42 U.S.C. section

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* Honorable James A. Parker, United States District Judge for the District of New Mexico, sitting by designation.

1983 action against Defendant-appellant Cleofas F. Muci, the former principal of Wichita North High School (Wichita North), Unified School District No. 259 (District 259), in Wichita, Kansas. Plaintiff alleges that defendant violated his Fourteenth Amendment equal protection rights under color of state law by denying him full-time employment as a social studies teacher/coach at Wichita North because of what Defendant perceived as Plaintiff's "homosexual tendencies." Plaintiff brought the action against Defendant in both Defendant's individual and official capacities. Defendant moved for summary judgment, claiming that Plaintiff had failed to place material facts in issue and that he was entitled to judgment as a

matter of law. The district court refused to grant summary judgment, and Defendant appeals. We exercise jurisdiction pursuant to 28 U.S.C. section 1291, see Pueblo Neighborhood Health Centers, Inc. v. Losavio 847 F.2d 642, 644 (10th Cir. 1988), and we reverse. The case is remanded for entry of summary judgment in favor of Defendant.

I.

Plaintiff has taught continuously since early 1987 in various District 259 schools, including some work as a substitute teacher at Wichita North. He has twice been rejected, however for full-time District 259 high school teaching positions. This case arises from his attempt to obtain a full-time position at Wichita North for the 1988-89

school year. Because of the merger of District 259 Ninth Graders into high school that year, the District created a new social studies teacher/coach position. Plaintiff interviewed for the position but was rejected in favor of Mathew Silverthorne, a recent college graduate who had student taught and coached at Wichita North. Defendant, the Wichita North principal, recommended that the District hire Mr. Silverthorne. It is undisputed on appeal that Jane Ware, Director of Secondary Personnel in District 259, actually made the employment offer to Mr. Silverthorne, but the district court found that Plaintiff had established on summary judgment that Defendant's decision not to recommend Plaintiff was an exercise

of de facto hiring authority.

Defendant argued below on summary judgment that he recommended Mr. Silverthorne because he was better qualified than Plaintiff. He also argued that he was qualifiedly immune from the claim brought against him in his personal capacity and that he did not have final policy decision making authority so as to give rise to entity liability for the claim brought against him in his official capacity. Plaintiff countered with summary judgment evidence to support his allegations that Defendant's decision resulted from prejudice against homosexuals; this; even though the record shows that Plaintiff is married, has two children, and does not claim to be homosexual or

bisexual. The summary judgment evidence came in the form of deposition testimony from Defendant's secretary, Sharon Fredin, and the director of social studies at Wichita North, William Jenkins. Ms. Fredin testified that she had remarked to Defendant sometime during the 1987-88 school year that Plaintiff reminded her of her former husband, whom she believed to be a homosexual. Mr. Jenkins testified that he knew and respected Plaintiff based on Plaintiff's substitute teaching experience and that he had recommended Plaintiff for the new position. He further testified that sometime during the fall of the 1988-89 school year he had inquired into why Plaintiff had not been hired and that Defendant had

stated that it was because of Plaintiff's "homosexual tendencies." Defendant admitted in deposition testimony that he had conveyed Ms. Fredin's remark to Mr. Jenkins, but he denied that this was his reason for not recommending Plaintiff.

In denying Defendant's motion for summary judgment, the district court held that material issues of fact existed regarding whether Defendant had violated Plaintiff's Fourteenth Amendment equal protection rights by denying employment based on a perceived homosexual classification. The court broke new ground and held that, as of 1991, the date of the decision, homosexuals and those perceived as homosexuals are a suspect class

deserving of heightened scrutiny in the equal protection context. 759 F. Supp. at 1546-51. Nevertheless, the court recognized that this new suspect classification could not possibly have been clearly established in 1988 when Defendant allegedly discriminated against Plaintiff. Id at 1552. Therefore, the court analyzed Plaintiff's qualified immunity defense under a rational basis test, holding that it was clearly established in 1988 that the government could not "'discriminate {against homosexuals} for the sake of discrimination.'" Id. at 1552 (citing Swift v. United States, 649 F. Supp 596 (D.D.C. 1986). Applying this precept as clearly established by one fellow district

court,[1] the court held that Defendant was not entitled to the qualified immunity defense because he did not offer a rational explanation for basing his hiring decision on a perception of "homosexual tendencies." Id at 1553. Furthermore, the court rejected Defendant's argument with regard to the claim against him in his

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1. Although the district court cited only to Swift we note that earlier opinions from the 1960's by the D.C. Circuit which are consistent with Swift. See Norton v. Macy 417 F.2d. 1161 (D.C. Cir. 1969) (mere homosexual conduct not grounds for dismissal from federal employment; instead the government must show a relationship between homosexuality and a negative effect on the efficiency of the government's service)' Scott v. Macy 349 F.2d. 182 (D.C. Cir. 1965) (government's refusal to hire plaintiff on grounds that he was homosexual was insufficient basis in absence of specific evidence of misconduct and the relationship of misconduct or immorality to occupation competence or fitness.)

official capacity, noting only that Plaintiff had demonstrated on summary judgment that Defendant's failure to recommend Plaintiff for employment was consistent with an established District 259 policy of allowing school principals unchecked hiring authority and that Defendant had not adduced summary judgment evidence of the participation of any other official in the decision to reject Plaintiff. Id at 1553 (citing Jett v. Dallas Independent School District, 491 U.S. 701 (1989)).

This appeal centers on the district court's treatment of the qualified immunity issue and Defendant's argument that he did not have final policy decision making authority. We address each issue in

turn.

II.

Qualified immunity shields government officials from the burdens of lawsuits stemming from the exercise of discretionary authority, yet it also allows for the vindication of constitutional rights. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Hannula v. City of Lakewood, 907 F.2d. 129, 130-31 (10th Cir. 1990). In striking a balance between these two competing goals, the Supreme Court has formulated a test based on the "objective reasonableness" of the conduct at issue as compared with the state of the law at the time of the alleged violation. Harlow, 457 U.S. at 818; Snell v. Tunnell, 920 F.2d. 673, 696 (10th Cir. 1990), cert denied, 111

S.Ct.1622 1991). Under this test, the burdens of a trial and personal liability may not be imposed on a government official for the exercise of discretionary authority unless his conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. This "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

Qualified immunity differs from other affirmative defense in that it protects the defendant from "the burdens associated with trial" as well as from personal liability. Pueblo Neighborhood Health Centers, 847 F.2d. at 645; Hannula 907 F.2d at 131.

Therefore, our review of the district court's summary judgment determination differs from the norm. Hannula, 907 F.2d.at 130. A defendant government official need only raise the qualified immunity defense to shift the summary judgment burden to the plaintiff. Id. This burden is quite heavy, id at 131, for the plaintiff must do more than simply allege the violation of a general legal precept. Anderson v. Creighton, 483 U.S. 635, 639-40 1987). The Plaintiff must"instead demonstrate a substantial correspond-ence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." Hannula, 907 F.2d. at 131. "The contours of the right must be sufficiently clear that a reasonable

official would understand that what he is doing violates that right." Anderson, 483 U.S. at 640. Clearly this standard does not require a precise factual analogy to pre-existing law; however, the plaintiff must demonstrate that the unlawfulness of the conduct was "apparent" in the light of pre-existing law. Id. Once the plaintiff meets his burden of coming forward with facts or allegations which demonstrate that the defendant's alleged violation should have been apparent in light of pre-existing law, the "defendant assumes the normal burden of a movant for summary judgment of establishing that no material facts remain in dispute that would defeat her or his claim of qualified immunity." Powell v.

Mikulecky, 891 F.2d. 1454, 1457 (10th Cir. 1989).

Applying the qualified immunity analysis to this case, we must determine whether Plaintiff has met his burden of demonstrating that Defendant's alleged conduct violated clearly established law of which a reasonable person would have been aware in 1988. Plaintiff contends that clearly established Fourteenth Amendment equal protection principles prohibited state and local officials from arbitrarily discriminating against homosexuals when Defendant refused to recommend him for the new social studies teacher/coach position at Wichita North in 1988. The district court agreed with this assertion, relying solely on United

States v. Swift 649 F.Supp. 596 (D.D.C. 1986). 759 F. Supp. at 1553. In Swift, the District Court for the District of Columbia held that "the government may not discriminate against homosexuals for the sake of discrimination, or for no reason at all." 649 F. Supp. at 602. By way of analogy, the district court in this case held that the government may not arbitrarily discriminate against "perceived homosexuals" either. 759 F.Supp at 1553.

On appeal, Plaintiff goes beyond Swift, relying primarily on a general discussion of equal protection principles. For qualified immunity purposes only, he concedes, as the district court recognized, that government classifications based on

sexual orientation were neither inherently suspect nor quasi-suspect as a matter of clearly established law in 1988. He concedes the same with regard to fundamental rights. Therefore, he does not discuss the higher levels of scrutiny applied to government actions which disparately affect such classes and rights.

Nevertheless, Plaintiff argues that Defendant's actions could not withstand the clearly established rational basis review applied to government classifications which do not call for higher levels of scrutiny. He cites United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) in which the Supreme Court held that a provision of the Food Stamp Act which was designed

to prevent hippies from participating in the Food Stamp Program could not withstand traditional rational basis review under a Fifth Amendment equal protection. Id, at 533-34. The Moreno Court noted that "(f) or the constitutional conception of 'equal protection of the laws' to mean anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id. at 534. Plaintiff also cites Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446-47 (1985), in which the Court applied the same principle under a Fourteenth Amendment equal protection analysis of a classification which disparately affected retarded

citizens. We take it as given that the Moreno and Cleburne references to Congressional desire to harm an unpopular group apply also to a school administrator's decision to deny employment to an applicant. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957) (State cannot conclude person from occupation in contravention of Fourteenth Amendment Equal Protection clause). See also Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (Equal Protection clause applies to discriminatory administration of facially neutral statute). Accordingly, Plaintiff contends that Defendant's bare desire to harm homosexuals by denying him the full-time position at Wichita North violated equal protection principles

clearly established in Moreno and Cleburne.

Plaintiff stresses that Defendant did not offer a rationale in district court for denying him a full time position based on a perceived homosexual status. Therefore, Plaintiff argues, the decision was per se invidious discrimination against homosexuals in violation of the general principles established in Moreno and Cleburne.[2] Plaintiff

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2. The district court agreed, although it relied only on Swift.: The present case provides no indication of any justification for the defendant's determination to discriminate on the basis of sexual orientation, nor, as the court has noted earlier , has the defendant attempted to supply one . . . . Accepting as true the evidence offered by the Plaintiff, as the court must under the relevant standards of review, the defendant acted arbitrarily, without any rational purpose, based upon personal prejudice

misapplies the qualified immunity standard, however. It was not Defendant's burden to demonstrate that his alleged conduct did not violate clearly established law. Rather it was plaintiff's burden "to demonstrate a "substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." Hannula 907 F.2d. at 131. Rather than a survey of the generalized rational basis test as applied in Moreno and Cleburne we think the "substantial correspondence" test at a minimum

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2. against homosexuals.

759 F. Supp. at 1553 (citing Swift, 649 F. Supp. at 602).

requires an examination of how courts have treated classifications affecting homosexuals, for the unlawfulness of the alleged activity must be "apparent" in light of pre-existing law before Defendant can be forced to endure the burdens associated with trial.

Examining the case law as it existed in 1988, we do not find a clearly established line of authority prescribing an adverse action against civilian job applicants based on homosexual or perceived homosexual orientation. In 1985, Justice Brennan aptly described the state of the law in this area: "whether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be

advanced to permit their infringement, are important questions that this Court has never addressed, and which have left lower courts in some disarray." Rowland v. Mad River Local School District, 470 U.S. 1009, 1015-16 (1985) (Brennan, J., dissenting from the denial of certiorari). The appeals court in Rowland reversed a jury verdict in favor of a bisexual high school guidance counselor who had been discharged from employment because she had expressed her sexual orientation. Regarding her equal protection claim, the appeals court reversed on plain error grounds because she failed to present "evidence of how other employees with different sexual preferences were treated". 730 F.2d 444, 450 (6th Cir.

1984). Justice Brennan viewed this holding as a transparent effort to evade the central question in the case: "may a State dismiss a public employee based on her sexual status alone?" 470 U.S. at 1011. Justice Brennan further noted that the court of appeals had answered this question in the affirmative by reversing the jury's verdict. Id at 1017-18.

Soon after Justice Brennan's dissent from the denial of certiorari in Rowland the Court held in Bowers v. Hardwick, 478 U.S. 186, 194 (1986) that homosexual sodomy was not a fundamental right under a Fourteenth Amendment substantive due process analysis. Plaintiff argues that Hardwick is inapposite because it dealt with a substantive due process

analysis whereas his claim is based on the equal protection clause. For purposes of qualified immunity, however, we need not decide how Hardwick affects equal protection claims; we need only note that courts have reached differing conclusions on the issue. See e.g., Ben-Shalom v. Marsh, 881 F.2d. 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.") cert. denied, 494 U.S. 1004 (1990); Woodward v. United States 871 F.2d. 1068, 1076 (Fed. Cir. 1989) ("After Hardwick it cannot logically be asserted that discrimination

against homosexuals is constitutionally infirm."), cert. denied, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d. 97, 103 (D.C. Cir. 1987) (" There can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."). But see Pruitt v. Cheney, 963 F.2d. 1160, 1166 n.5 (9th Cir. 1992) (reviewing status-based discrimination against homosexuals under an active rational basis review, distinguishing Hardwick as conduct based on discrimination; High Tech Gays v. Defense Indust. Security Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (same).

Plaintiff argues that even though the cases interpreting Hardwick have reached differing results on the level

of scrutiny applied to classifications based on homosexual conduct or status, each court applied at least the minimal rational basis test of Moreno and Cleburne. We agree, and prior to Hardwick we twice applied rational basis review to classifications which disparately affected homosexuals. See Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984); National Gay Task Force v. Board of Edu., 729 F.2d 1270, 1273 (10th Cir. 1984), aff'd by an equally divided court, 470 U.S. 903 (1985).[3] The Supreme Court,

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3. Given our disposition of this case on immunity grounds, we need not address the district court's holding that classifications based on homosexual status as opposed to homosexual conduct are inherently suspect. 759 F. Supp. at 1546-51. We note, however, that the court failed to cite Rich, in which we held that a status-based classification was not inherently suspect. Were we to have the issue before us, we would not be entitled as a three-judge panel to overrule circuit precedent. United States v. Spedalieri, 910 F.2d 707, 710 n.3 (10th Cir. 1990)

however, held in Hardwick that the community's notions of morality were sufficient to provide a rational basis for the statute. Id. at 196 See also Barnes v. Glenn Theater, Inc. 111 S.Ct.2456,2468 (1991)(Scalia,J., concurring)("In Bowers,we held that since homosexual behavior is not a fundamental right, a Georgia law prohibiting private homosexual intercourse needed only a rational basis in order to comply with the Due Process Clause. Moral opposition to homosexuality, we said, provided that rational basis.") Although the Hardwick Court did not deal with an equal protection claim, for qualified immunity purposes we think its holding, and the general state of confusion in the law at the time,cast enough shadow on the area so

that any unlawfulness in Defendant's actions was not "apparent" in 1988. And we do not find Swift, 649 F.Supp. 596, which formed the basis of the district court's holding in this case, to clarify the law. Therefore, we hold that Defendant is entitled to qualified immunity.

III.

At issue next is whether Defendant may be held liable--i.e. whether District 259 may be held liable--for damages resulting from the suit brought against him in his official capacity.[4] Section 1983

4. Plaintiff's official capacity action against Defendant is in reality an action against District 259, and District 259 has had notice and an opportunity to respond. See Kentucky v. Graham, 473 U.S. 159, 165 (1985) ("As long as the government entity receives notice and opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.") District 259 may not plead qualified immunity. See Owen v. City of Independence, 445 U.S. 622 , 657 (1979)

liability for the single act of an employee may not be imposed on a local government entity under a respondeat superior theory. Monell v. City of New York Dept. of Social Services, 436 U.S. 658, 694 (1978). Rather such liability may be imposed only if the employee possesses "final authority" under state law to establish policy with respect to the challenged action. See Jett v. Dallas Indep. School Dist., 491 U.S. 701, 736-38 (1989) City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 481-84 (1986); Ware v. Unified School District No. 492, 902 F.2d 815, 817 (10th Cir. 1990.) Whether Defendant possessed such "final authority" is a question of

state law. Ware , 902 F.2d at 817. We review the denial of summary judgment on this issue under the same standard as the district court. Osgood v. State Farm Mut. Auto Ins. 848 F.2d 141, 143 (10th Cir. 1988) Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . . the moving party is entitled to a judgment as a matter of law." Fed R. Civ. P.56(c).

This issue is controlled by our decision in Ware. In Ware we interpreted Kansas law and held that final hiring authority in the Kansas school system rests in the school boards. 902 F.2d at 818 (citing Kan. Stat. Ann section 72-8202C (1985) Furthermore, we held that the school boards had no statutory authority to

delegate hiring authority to subordinates. Id. (citing Hobart v. Board of Educ. of Unified School Dist. No. 309, 230 Kan. 375, 634 P.2d 1088, 1094 (1981)). Therefore in this case it is beyond dispute that Defendant, as principal of Wichita North, did not have "final authority" under Kansas law to hire teachers. In Ware however, we noted "that lawfully empowered decisionmakers cannot insulate themselves from liability under section 1983 by knowingly allowing a subordinate to exercise final policymaking authority vested by law in the decisionmakers." Id. (citing Praprotnik, 485 U.S. at 126-27.) (emphasis in original). This type of delegation "arises when a subordinate's decision is couched as a

policy statement expressly approved by the policymaking entity, or when the decision manifests a custom or usage of which the entity must have been aware." Id (citing Praprotnik, 485 U.S. at 130). Plaintiff does not contend that Defendant's decision was couched in terms of a policy statement. Rather, he contends that District 259 delegated hiring authority to Defendant by "custom or usage," noting that the district court found that Defendant and other principals had virtual de facto hiring authority. The district court anchored its summary judgment determination on this finding, although it did not discuss Kansas law. 759 F. Supp. at 1553.

The district court noted

that "ultimate hiring decisions rarely conflict with the decision of the school principals (in District 259)." Id "Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy." Praprotnik 485 U.S. at 130. Delegation must be absolute to give rise to the "final authority." If the board retains the authority to review, even though it may not exercise such review or investigate the basis of the decision, delegation of final authority does not occur. See id. See also Williams v. Butler, 863 F. 2d 1398, 1402 (8th Cir 1988) ("A clear message from Praprotnik is that an incomplete delegation of authority--i.e., the right of review is

retained--will not result in municipal liability, whereas an absolute delegation of authority may result in liability on the part of the municipality."), cert. denied, 492 U.S. 906 (1989); Worsham v. City of Pasadena, 881 F.2d 1336, 1341 (5th Cir. 1989) (citing Williams v. Butler). The uncontroverted record on summary judgment in this case demonstrates that the Board retained the right to review hiring decisions made by District 259 principals, including Defendant. See 759 F. Supp. at 1553 ("The principal's discretion in hiring is not unfettered."). Therefore, we do not find a delegation of policymaking authority. Summary judgment should have issued in favor of Defendant on the official capacity

claim.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VERNON R. JANTZ, Plaintiff,	)	
vs.	)	No. 89-1628-K
CLEOFAS F. MUCI, Defendant,	)	

MEMORANDUM AND ORDER

Plaintiff Vernon Jantz has brought the present action under 42 U.S.C. section 1983 alleging a violation of his right to equal protection. The plaintiff alleges that he was denied by the defendant, then-school principal Cleofas Muci, employment as a public school teacher on the basis of Muci's perception that Jantz had "homosexual tendencies." The defendant has now moved for summary judgment.

Arguments relating to the defendant's motion were presented to the court in a hearing conducted March 21, 1991. Consistent with the views of the court expressed during the course of the hearing, and for the reasons addressed herein, the court hereby grants in part, and denies in part, the defendant's motion for summary judgment.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c). In considering a motion for summary judgment, the court

must examine all evidence in a light most favorable to the opposing party. McKenzie v. Mercy Hospital, 854 F.2d 365, 367 (10th Cir. 1988). The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. Ellis v. El Passo Natural Gas Co., 754 F.2d 884, 885 (10th Cir. 1985). The moving party need not disapprove plaintiff's claim; it need only establish that the factual allegations have no legal significance. Dayton Hudson Corp. v. Macerich Real Estate Co. , 812 F.2d 1319, 1323 (10th Cir. 1987).

In resisting a motion for summary judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or

briefs. Rather, the non moving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegations. Anderson v. Liberty Lobby Inc. 477 U.S. 242, 256 (1986). Once the moving party has carried its burden under Rule 56(c) the party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the non moving party must come forward with specific facts showing that there is a genuine issue for trial.'" Matsushita Elect. Indus. Co. Ltd. v. Zenith Radio Corp, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P.56(e)) (Emphasis in

Matsushita). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. Cleotex Corp v. Catrett, 477 U.S. 317 (1986)

Vernon Jantz graduated from high school in Newton, Kansas in 1963. He graduated cum laude from Wichita State University, receiving a bachelor's degree from Wichita State University in 1972 and a master's degree in 1978. After serving in the United States Air Force, Jantz completed course work in secondary education at Western New Mexico State University, and obtained a New Mexico secondary school teaching permit in

1985.

During the 1985-86 school year, Jantz taught social studies in the New Mexico schools. Jantz and his wife moved to Wichita, Kansas in the summer of 1986, Obtaining Kansas certification in September, 1986, Jantz took employment with Unified School District No. 259 and began substitute teaching for the district in early 1987. Jantz substituted at several middle and elementary schools in the district, including Wichita North High School.

During this time, Jantz did no coaching. In his interviews with school administrators, including an interview conducted by a Wichita North administrative officer on behalf of Muci, Jantz did not volunteer to

perform coaching activities. By the same token, Jantz was not asked whether he was able and willing to assume coaching responsibilities. Jantz, who had experience in basketball, baseball, soccer, and tennis, was able to coach, and would have done so had he been asked.

In May, 1987 Jantz contacted the district's Director of Secondary Personnel, Frank Crawford, and inquired about the possibility of obtaining a teacher' s position for the 1987-88 school year. Despite his talk with Crawford, it remained uncertain whether there were any openings for the upcoming school year. Jantz interviewed at Wichita South and at Wichita North (with associate principal Milford Johnson). However,

as it turned out, no positions were open for the 1987-88 school year at the schools where Jantz interviewed. As with the previous year, Jantz provided substitute teaching services during the 1987-88 school year.

Jantz met with Crawford's successor, Jane Ware, in February 1988. Due to the upcoming merger of ninth grade students into Wichita high schools a combined social studies teacher and coach position was created at Wichita North for the 1988-89 school year. Jantz applied for the position.

The contentions of fact presented by the parties establish that the principals of the individual schools in the district exercise de facto the predominate role in hiring

decisions, with some input by the district personnel office. The principal usually conducts the job interview with any applicant and his determination is normally decisive.

Jantz's application was turned down and Matthew Silverthorne was selected to fill the new position. The parties dispute the reason for this decision by Wichita North's principal, Cleofas Muci. Muci was principal of Wichita North for the 1986-87 and 1987-88 school year. Muci retired in November, 1988.

According to Muci, he hired Silverthorne because he was the best candidate. Silverthorne had student taught and coached at Wichita North. In Muci's opinion, Silverthorne had done a good job while coaching.[1]

1. The defendant alleges at p.9 of

Silverthorne was certified to teach social studies (with the exception of world geography, in which he had only a provisional certification).

Jantz disputes this version of the decision to hire Silverthorne. Jantz cites the testimony of Sharon Fredin (Muci's secretary) and William Jenkins (the coordinator of social studies at Wichita North). Fredin has acknowledged in her deposition that during the 1987-88 school year she "made the offhand comment" to Muci that Jantz reminded her of her husband, whom she believed to be a

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1. his reply brief, that Silverthorne was an "avid" coach who volunteered for coaching assignments. The cited portion of Muci's deposition testimony establishes neither point, only that he performed his coaching responsibilities well.

homosexual. Jenkins has testified that when he asked why Jantz was not hired for the new position, Muci told him it was because of Jantz's "homosexual tendencies."

After being denied the social sciences position at Wichita North, Jantz worked during the 1989-90 school year as a (half-time) social studies teacher and a (half-time) facilitator for the gifted students at Jardin Middle School. Jantz currently is employed full-time as a facilitator for gifted students at Hadley Intermediate School. Jantz is a 45-year-old white male. He is married with two children.

The positions of the parties are diametrically opposed and under the rules of summary judgment the

court must accept the plaintiff's version as correct. Defendant Muci makes several arguments seeking to contradict the plaintiff's version: he stresses Jenkins misspelling of Muci's name in his affidavit, suggests that his ex-secretary Fredin's "recollection is questionable," and generally denies any discriminatory intent against homosexuals. Muci also spills a great deal of ink in his briefs arguing from the premise that Muci simply made a professional, good faith selection of the candidate he believed to be the better qualified.

The problem, of course, is that the rules of summary judgment do not allow such a premise. Under those rules, Jantz's version of the events leading to the selection of

Silverthorne must be taken as true. Muci is entitled to argue his version to the jury at the trial of the present matter, but for purposes of resolving the present motion for summary judgment, the court must accept as true that the real reason for the failure to hire Jantz was Muci's belief that Jantz had "homosexual tendencies."

The court concludes that Jantz has articulated a claim which, if proven at trial, sets forth a violation of his constitutional rights under 42 U.S.C. section 1983. "The time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protectible interests." Acanfora v. Board of Educ. 359 F. Supp. 843, 851

(D. Md. 1973), aff'd on other grounds 491 F.2d 498 (4th Cir.); cert denied, 419 U.S. 836 (1974) The court will address Jantz's equal protection claim under two potentially relevant standards. The court will discuss the claim in the context of both a heightened scrutiny analysis, and in the additional context of the potential arbitrary and capricious nature of the classification. The court will then address the defendant's claim to qualified immunity as it relates to both the heightened scrutiny and rational basis analyses.

Heightened Scrutiny

In Bowers v. Hardwick, 478 U.S. 186 (1986) the Supreme Court held that the due process clause of the

Fourteenth Amendment does not prohibit the states from criminalizing homosexual sodomy. That case cited by defendant Muci, is not directly relevant here. The Bowers Court only addressed the respondent's claim that the Georgia statute was a violation of due process; equal protection was not in issue. The case presented the limited issue of whether homosexual conduct could be regulated by the states. Whether a state or its agents may discriminate among citizens on the basis of their sexual orientation was not at issue.

The distinction between conduct and orientation is both proper and useful in analyzing the constitutional rights of homosexuals. See Sunstein, Sexual Orientation and

the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U.Chi.L.Rev. 1161, 1162 (1988). Due process which was at issue in Bowers, serves as a limitation of majoritarian restrictions of traditionally favored and sanctioned activities and rights; it necessarily focuses on historical practice and tradition. Equal protection, on the other hand, protects disadvantaged groups of individuals from governmental discrimination, even where the discrimination is enshrined in a deep historical tradition. Id at 1163, 1170-74. Bowers merely established that homosexual conduct was not a recognized historical liberty. The case does not deal with the issue of

whether societal bigotry against private homosexual orientation or tendencies legitimizes governmental discrimination against homosexuals under equal protection. See John Charles Hayes, The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick, 31 B.C.L. Rev. 37[illegible] (1990) Indeed, as Judge Norris recognized in his concurring opinion in Watkins v. United States Army, 875 F.2d 699, 711 (9th Cir. 1989) (Norris J., concurring in the judgment), cert. denied, ___U.S. ___, 111 S.Ct. 384, 112 L.Ed.2d 395 (1990), the strength of the historical tradition of discrimination against homosexuals documented by the Supreme Court in

Bowers, while supporting the denial of the due process claim in that case, in fact supports the view that governmental discrimination on the basis of sexual orientation may represent a violation of equal protection considerations.

> It is perfectly consistent to say that homosexual sodomy is not a practice so deeply rooted in our traditions as to merit due process protection, and at the same time to say, for example, that because homosexuals have historically been subjected to invidious discrimination laws which burden homosexuals as a class should be subjected to heightened scrutiny under the equal protection clause. Indeed, the two propositions may be considered complementary: In all probability, homosexuality is not considered a deeply-rooted part of our traditions <u>precisely because</u> homosexuals have historically been subjected to invidious discrimination.

<u>Id</u> at 719 (emphasis in original).

The distinction between conduct and orientation may be seen in the cases decided by lower federal courts which have discussed the appropriate standard for review of governmental discrimination against homosexual activity. Decisions which have refused to impose a heightened scrutiny analysis have done so with an emphasis that persons engaging in homosexual conduct do not constitute a suspect class. See High Tech Gays v. Defense Industr. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (challenged regulations "all relate to conduct" rather than orientation); Padula v. Webster, 822 F.2d 97 (D.C. Cir 1987) (homosexual orientation not resulting in homosexual conduct not in issue); National Gay Task Force v.

Board of Education, 729 F.2d 1270 (10th Cir. 1984), aff'd by an equally divided court, 470 U.S. 903 (1985) (teachers could be fired for "engaging in an indiscreet public act of oral or anal intercourse"); Singer v. United States Civil Service Com'n, 530 F.2d 247 (9th Cir. 1976).[2]

Bowers however, provides no bar to the use of heightened scrutiny when analyzing governmental discrimination based upon sexual orientation. However, in identifying which governmental classifications require heightened scrutiny analysis,

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2 One Circuit has abandoned explicitly the distinction between orientation and conduct which has been stressed in other cases. In Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, ___ U.S.___, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990), the Seventh Circuit held, without any evidence in the case before it, and without citation to any authority of any kind, that the plaintiff's admitted lesbian orientation compelled

the Supreme Court, in a series of cases, has identified several considerations which are relevant. The discrimination must be invidious and unjustifiable, that is, discrimination based upon obvious, immutable, or distinguishing trait which frequently bears no relation to ability to perform or contribute to society. A second factor is whether the class historically has suffered from purposeful discrimination. Third and finally, the class must lack the political power necessary to obtain protection from the political branches of government. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41 (1985); Plyler v. Doe, 457 U.S. 202, 216 n.14, 219-23 (1982);

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2. the "reasonable inference" that she "has in the past and is likely to again engage in such conduct.

"Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); San Antonio Indep. School Dist. V. Rodriguez, 411 U.S. 1, 28 (1973); Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973).

In denying heightened scrutiny to discrimination against homosexuals, two circuit courts have found that homosexuality was not an immutable characteristic.[3]

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3. In High Tech Gays v. Defense Indus. Sec. Clearance Office 895 F.2d 563, 573 (9th Cir. 1990), the Ninth circuit, without citation to any evidence in the record to a single medical authority, announced that: "homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes." In Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), the Federal Circuit also opined that "members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in character." As with the Ninth Circuit in High Tech Gays, the court offered not the slightest support or authority for the position that homosexuality is a mutable characteristic.

In both cases, the findings were made without the benefit of any supporting authority, and were barren of any cited scientific or medical authority which would lend support to such conclusions. Nor did the courts cite in evidence in the records before them, instead simply intoning that homosexual orientation was not immutable.

This, of course is hardly surprising, in view of the overwhelming weight of currently available scientific information. According to that information, sexual orientation (whether homosexual or heterosexual) is generally not subject to conscious change.[4] Sexual

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4. See Coleman, "changing Approaches to the Treatment of Homosexuality ," in Homosexuality: Social,

orientation becomes fixed during early childhood, "it is not a matter of conscious or controllable choice." High Tech Gays v. Defense Ind. Clearance Off. 909 F.2d 375(9th Cir 1990) (En banc)(Canby,J.,dissenting)Judge Norris has put the issue in terms the ordinary person (whether heterosexual or homosexual) can appreciate. If the

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4. Psychological, and Biological Issues, 81-88 (W.Paul, J. Weinrich, J. Bonsiorek & M. Hotvedt Eds 1982); A. Bell, M. Weinbert, & F. Hammersmith, Sexual Preference--Its Development in Men and Women,166-67,211,222(1981); McConaghy, Is a Homosexual Orientation Irreversible? 129 Brit. J. Psychiatry, 556, 563 (1976); Acosta, Etiology and Treatment of Homosexuality, 4 Arch. Sexual Behavior, 9, 23-24 (1975) ; C. Tripp, The Homosexual Matrix, (1975) ; Ross & Stalstorm, Arch.Exorcism as Psychiatric Treatment: A Homosexual Case Study, 8, Arch. Sexual Behavior, 379 (1979) Additional authorities are cited in Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality 57 S.Cal.L.Rev.797, 819-21.

government began to discriminate against heterosexuals, how many heterosexuals "would find it easy not only to abstain from heterosexual activity but also shift the object of their desires to persons of the same sex?" Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., Concurring.).

Aside from the available scientific evidence, which strongly supports the view that sexual orientation is not easily mutable, complete and absolute immutability simply is not a prerequisite for suspect classification.[5] Race, gender alienage, and illegitimacy can all be changed, yet discrimination on the

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5. In listing the factors relevant to

basis of any of these categories compels heightened scrutiny by the courts. Aliens may obtain citizenship, gender may be altered by surgery, lighter-skinned blacks may pass as white. Discrimination on the basis of race would not become permissible merely because a future scientific advance permits the change in skin pigmentation.

The consideration of the mutability of a personal trait which is the subject of governmental discrimination serves a more general

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5. the determination that a governmental classification is suspect, the Supreme Court has omitted citing immutability as a requirement on several occasions. City of Cleburne v. Cleburne Living Center 473 U.S. 432, 440-41 (1985); Massachusetts Bd. of Retirement v. Murgia 427 U.S. 307, 313 (1976); San Antonio School Dist v. Rodriguez, 411 U.S. 1, 28, (1973).

purpose, indicating the existence of particularly heinous and reprehensible forms of discrimination. While traits such as race, gender, or sexual orientation may be altered or concealed, that change can only occur at a prohibitive cost to the average individual. Immutability therefore defines traits which are central, defining traits of personhood, which may be altered only at the expense of significant damage to the individual's sense of self. See L. Tribe, American Constitutional Law section 16-33 at 1616 (1988) (sexual orientation, whether homosexual or heterosexual, is central to the personality of the individual); Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect

Classification, 98 Har. L. Rev. 1285, 1303 (1985) Watkins v. United States Army, 875 F.2d at 726 (sexual orientation serves as "a central aspect of individual and group identity")

In this context, classification on the basis of sexual orientation fulfills the concern that the identifying trait of the class be immutable. Sexual orientation is a trait which is not subject to voluntary control or change. More importantly, to discriminate against individuals who accept their given sexual orientation and refuse to alter that orientation to conform to societal norms does significant violence to a central and defining character of those individuals.

Discrimination on the basis of sexual orientation is invidious. In addition to the immutable nature of the trait, homosexual individuals have been and are the subject of incorrect stereotyping. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729-30 (1982) (invalidating discrimination based on stereotype of what constitutes acceptable female work). Homosexual orientation "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Resolution of the American Psychological Association (Jan. 1985). Nor does homosexual orientation alone impair job performance, including the job of teaching in public schools. Acanfora

v. Board of Educ., 359 F. Supp. at 851. See also Norton v. Macy 417 F.2d 1161 (D.C. Cir. 1969) As a class-defining trait, sexual orientation "bears no relation to ability to perform or contribute to society." Frontiero v. Richardson, 411 U.S. 686.

Yet homosexuals remain the subject of significant and virulent stereotyping in modern society. Homosexuals are believed to be effeminate (if gay) or masculine (if lesbian), they are believed to proselytize children to homosexuality or indeed seek out children to molest, they are believed to be mentally ill; stereotypes which are all demonstrably false. See Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications

based on Homosexuality, 57 S. Cal.L.Rev.797, 821-24 (1984) In truth, the sexual orientation of the vast majority of homosexuals is not identifiable on the basis of mannerism alone. Marmor, "Clinical Aspects of Male Homosexuality," in Homosexual Behavior: A Modern Reappraisal 267 (Marmor ed. 1980) Homosexuals are no more likely to molest children than are heterosexuals. Id. at 271; State of Oregon Dept of Human Resources, Final Report of the Task Force on Sexual Preference, 21 (1978) Homosexuals are not mentally ill. "The National Association for Mental Health, the American Psychiatric Association, and the Surgeon General now agree that homosexuality in and of itself, is not a mental illness." 57

S.Cal.L.Rev. at 824.

In addition to the invidiousness of discrimination presently faced by members of a classification--the presence of inaccurate stereotyping, the lack of any connection between the classification and the ability of the individual to perform in society--the Supreme Court has also focused on the historical background of that discrimination, to determine whether the class has suffered a history of purposeful discrimination. Homosexuals in the United States have historically been subjected to discrimination both pervasive in its scope and intense in its impact. Rowland v. Mad River Local School Dist. 470 U.S. 1009, 1014 (1985)

(Brennan,J. dissenting from denial of cert.)(homosexuals have been the historical object of "pernicious and sustained hostility".) See also 98 Har. L.Rev.at 1302 (Stigmatization of homosexuals has "persisted throughout history,across cultures,and in the United States"):57 S.Cal.L.Rev.at 824-25 (homosexuals "have historically faced pervasive discrimination" in America). Widespread discrimination against homo sexuals exists in both public and private employment. Developments in the Law-Sexual Orientation and the Law, 102 Har.L.Rev.1508,1554,1575 (1989). Homosexuals must also face discrimination in many other facets of modern life.Id at 1671. In finding jobs, securing housing, in nearly every aspect of social existence,

discrimination on the basis of sexual orientation has been a persistent facet of life in America. The prejudice against homosexuals is "so severe and pervasive that homosexuals are often forced to hide their identities as homosexuals." 31 B.C.L.Rev. at 377.

Unfortunately the deep-seated societal prejudice against homosexuals also evidences itself in widespread violence against homosexuals. One study has found that homosexuals probably face victimization more frequently than any other minority group. P.Finn & T. McNeil, The Response of the Criminal Justice System to Bias Crime: An Exploratory Review, at 2 (1987) Law enforcement officials report that violence against homosexuals is both

significant, and perhaps due to the AIDS epidemic, increasing. See Swisher & Masters, Police, Gay Activists See Rise in Assaults on Homosexuals, Washington Post, Sept. 17, 1989 at A1; Mannery, Anti-Gay Acts in U.S. Widespread, Chicago Tribune June 8, 1990 at 20; Schoolman, Bias crimes Against Gays Increasing in Major U.S. Cities, Reuters, Mar. 6, 1991.

A final consideration used by the Supreme Court in identifying governmental classifications which require heightened scrutiny is whether the class has traditionally been unable to protect the rights of its members through the political process. Heightened scrutiny serves to protect politically powerless minorities or

groups against majoritarian abuses. Special protection is accorded the class under heightened scrutiny analysis because it is unable to secure similar protection through representative government. See Cleburne, 473 U.S. at 441; Plyler, 457 U.S. at 216 n.14; Murgia, 427 U.S. at 313; Rodriguez, 411 U.S. at 28.

One circuit court, in refusing to extend heightened scrutiny to homosexuals, argued that recent legislation in several states indicates that homosexuals are not politically powerless. Citing anti-discrimination provisions in three states, an executive order in New York, and a series of local ordinances, the Ninth Circuit in High Tech Gays, 895 F.2d 574, announced:

"Thus homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation."

As an initial matter, it must be observed that this view is premised on an inaccurate, and exaggerated, view of recent state anti-discrimination legislation. The Ninth Circuit's catalogue of legislative action is taken directly from two footnotes to a recent Harvard University analysis of homosexual rights in America in Developments in the Law--Sexual Orientation and the Law, 102 Har. L. Rev. 1508, 1667 n. 49, & 1668 n. 51 (1989). The court ignored the test which accompanies this section of the Harvard study:

"unfortunately, very little legislation protects gay men and lesbians from discrimination in the private sector. No federal statute bars discrimination by private citizens or organizations on the basis of sexual orientation. Nor do the states provide such protection: only Wisconsin has a comprehensive statute barring such discrimination in employment." Id. at 1667. The Harard study concludes that discrimination against homosexuals is pervasive, and recent changes in the law too inadequate to provide adequate protection. Unless more is done, the study found, "gay men and lesbians will remain unable to conduct their lives free from discrimination." Id. at 1671.

The Ninth Circuit's position in High Tech Gays not only exaggerates the significance of recent anti-discrimination efforts, it suffers from a more fundamental error. It mistakenly assumes that scattered, piecemeal success in local legislation are proof of political power, and hence an invalidation of the use of heightened scrutiny in governmental classifications based on sexual orientation. The standard implicitly adopted by the Ninth Circuit would disqualify every group from suspect or quasi-suspect status. Blacks, women, aliens, or any group which has obtained some form of legislative protection would forfeit the benefits of heightened scrutiny. As Judge Canby has properly observed, the Ninth

Circuit's argument in High Tech Gays is not consistent with the Supreme Court's treatment of other minorities. The existence of isolated, local anti-discrimination successes

> is clearly insufficient to deprive homosexuals of the status of a suspect classification. Compare the situation with that of blacks, who clearly constitute a suspect category for equal protection purposes. Blacks are protected by three federal constitutional amendments, major federal Civil Rights Acts of 1866, 1870, 1871, 1875, (ill-fated though it was) 1957, 1960, 1964, 1965, and 1968, as well as by anti discrimination laws in 48 of the states. By that comparison, and by absolute standards as well, homosexuals are politically powerless.

High Tech Gays v. Defense Clearance Off. 909_F.2d at 378 (Canby, J. Dissenting from denial of rehearing en banc)

In reality, homosexuals face severe limitations on their ability to

protect their interest by means of the political process. As Justice Brennan has observed, "because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." Rowland v. Mad River Local School Dist. 470 U.S. 1014 See also High Tech Gays 909 F. 2d at 378 (homosexuals are regarded as political pariahs" by the major political parties); and Watkins 875 F.2d at 727 (Norris,j. concurring in the judgment) (homosexuals face structural barriers rendering "effective political participation unlikely if not impossible").

There are several factors

which limit effective political action by homosexuals. Due to the harsh penalties imposed by society on persons identified as homosexual, many homosexual persons conceal their sexual orientation. Silence, however, has its cost. It may allow a given individual to escape from the discrimination, abuse, and even violence which is often directed at homosexuals, but it ensures that homosexuals as a group are unheard politically. Moreover, the prejudice that compels many homosexuals to refrain from open political activity also limits access to political power in other ways. By diminishing contact between the heterosexual majority and avowed homosexuals, the majority loses any perspective on concerns in the

homosexual community and is deprived of the resulting sensitivity to those concerns. Politicians seeking to limit the impact of anti-homosexual prejudices through legislation are themselves the target of prejudice. 57 S.Cal. L. Rev. at 825-27.

There is, the court believes, no way to analyze the present issue under the guidelines set down by the Supreme Court and reach any conclusion other than that discrimination based on sexual orientation is inherently suspect. Sexual orientation is not a matter of choice; it is a central and defining aspect of the personality of every individual. Homosexuals have been and remain the subject of invidious discrimination. No other identifiable

minority group faces the dilemma dealt with every day by the homosexual community -- the combination of active and virulent prejudice with the lack of an effective political voice. Only by abandoning the established tests of suspectness, and retreating to some other formulation is it possible to achieve some other result. This court cannot join in such a retreat. Accordingly, the court finds that a governmental classification based on an individual's sexual orientation is inherently suspect.

Rational Basis

For reasons discussed below, the court finds that it is also necessary to discuss the present case in the context of the most permissive standard applicable in equal

protection analysis, the rational basis standard. That is, even assuming there is no suspect class here, the question remains whether there is any rational basis for the consideration of sexual orientation in public employment decision making.

There are special circumstances in which a rational basis for such discrimination has been found. In cases which have refused to apply heightened scrutiny to the defendant's conduct in discriminating against homosexual conduct, a rational basis for the conduct has been found in the need to maintain morale and discipline in the armed forces, Ben-Shalom v. Marsh 881 F.2d 454 (7th Cirt. 1989); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir.

1989); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980); the requirement for avoiding illegality among law enforcement personnel, Padula v. Webster 822 F.2d 97 (D.C. Cir 1987); and the need to limit the exposure of persons in positions with access to sensitive information to blackmail, High Tech Gays v. Defense Industr. Security Clearance Off. 895 F.2d 575-78 (Department of Defense personnel with secret and top secret security clearance) Padula 822 F.2d at 97 (FBI agent)

Of course, none of those considerations are present here. There is no threat to discipline, no threat of blackmail. Nor, it must be noted, does the defendant even attempt to offer a rational basis for his

alleged discrimination on the basis of sexual orientation.

The defendant's brief, to the extent that it makes any attempt to identify a rational basis for his actions, merely reasserts his denial of any consideration of Jantz's alleged "homosexual tendencies," and contends that the only considerations which affected his decision were legitimate employment factors, such as coaching experience. The problem with this is that it wholly ignores the standards of summary judgment which require the court to assume the truth of Jantz's version of the facts: that Muci refused to hire Jantz because of his perceived homosexual orientation.

This approach was maintained by the defendant during the hearing on

the present motion. Despite repeated invitations by the court, the defendant modestly declined to identify any rational basis for a decision not to hire predicated on Jantz's alleged "homosexual tendencies." The defendant instead used each opportunity extended by the court to retreat into his factual argument, averring that the decision not to hire Jantz had nothing to do with his perceived sexual orientation, and was solely based upon Silverthorne's superior coaching experience.

Assuming, however, that the plaintiff's factual contentions are correct and that the true reason for the refusal to accept Jantz for the teaching position was Muci's

perception of Jantz's "homosexual tendencies," the defendant offers not one word of support to the action. He makes no attempt to defend the consideration of perceived sexual orientation in determining whether to employ an applicant for a public school teaching position. Nor, the court believes, is there any possible rational basis for such discrimination in this day and age.

Homosexual orientation alone does not impair job performance, including the job of teaching public schools. Acanfora v. Board of Educ., 359 F. Supp. at 851 See also Norton v. Macy, 417 F.2d 1161. In Swift v. United States, 649 F. Supp. 596 (D.D.C. 1986) the plaintiff was a stenographer whose job transcribing

presidential speeches and press conferences was terminated when the government revoked his White House security clearance . The government asserted the plaintiff was a "national security risk" and barred him from access to the White House. The district court denied the government's motion to dismiss, finding that the arbitrary discrimination on the basis of sexual orientation would violate the plaintiff's right to equal protection, even without the use of heightened scrutiny:

> Homosexual conduct may not be protected under the right of privacy, and homosexuals may not qualify as a suspect class. Nonetheless, the government may not discriminate against homosexuals for the sake of discrimination or for no reason at all.

649 F. Supp at 602.

This court accordingly concludes that the refusal to hire plaintiff on the basis of his perceived sexual orientation was the result of an action by the defendant which was arbitrary and capricious in nature.

Qualified Immunity

A key point in the defendant's motion for summary judgment, and almost the exclusive point made in the defendant's reply, is that even if there was some wrongful discrimination, the defendant is nonetheless qualifiedly immune. Under the doctrine of qualified immunity, governmental officials performing discretionary functions are shielded from civil damage actions insofar as their conduct does not violate clearly

established statutory or constitutional rights. Harlow v. Fitzgerald 457 U.S.800,818 (1982) Qualified immunity exists unless the plaintiff can demonstrate that the contours of the right allegedly violated by the defendant were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). In response to a claim of qualified immunity, the plaintiff must demonstrate by facts or by allegation both that the defendant violated the law and that the law was clearly established at the time of the violation. Snell v. Tunnell 920 F.2d 673, 696 (10th Cir. 1990); Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642,

646 (10th Cir. 1988).

The defense is not available, however, for discrimination which is purely arbitrary and without any rational basis. As the Tenth Circuit has observed, "when a plaintiff can point to specific facts of defendant's improper motivation, qualified immunity may be inappropriate due to a 'conflict sufficiently material to defendants claim of immunity to require him to stand trial." Snell, 920 F.2d at 696-97 (quoting DeVargas v. Mason & Hanger-Silas Mason Co., 884 F.2d 714, 719 (10th Cir. 1988) (other citations omitted.)

The defendant's argument with regard to qualified immunity is similar to his discussion (or rather lack thereof) relating to rational

basis: he simply argues that he made a good faith professional decision which was not affected by even the slightest consideration of Jantz's alleged homosexuality. But again, the question for the court is whether, assuming Muci's real reason for not hiring Jantz was because of his "homosexual tendencies," Muci is entitled to any qualified immunity defense.

The court finds the answer is no. Certainly when the decision not to hire Jantz was made, homosexual orientation was not established as a suspect class. Muci's actions cannot therefore be tested against whether they were necessary to achieve a compelling governmental objective. Despite the court's conclusion above

that discrimination on the basis of sexual orientation is inherently suspect, that determination cannot support the plaintiff's claim in the present case. At the time of the determination not to hire Jantz, the suspect nature of the classification was not clearly established.

But it had by that time been established, as the district court recognized in Swift, that the government cannot "discriminate for the sake of discrimination." Qualified immunity is no defense where the action of the defendant was not in good faith, was undertaken arbitrarily and without any rational motivation, and motivated instead by a visceral, unreasoning prejudice against homosexuals. See Swift, 649 F. Supp.

at 602. The present case provides no indication of any justification for the defendant's determination to discriminate on the basis of sexual orientation, nor, as the court has noted earlier, has the defendant attempted to supply one. The defendant has not only failed, but has indeed actively avoided attempting to articulate any rational basis for such a decision. Accepting as true the evidence offered by the plaintiff, as the court must under the relevant standards of review, the defendant acted arbitrarily, without any rational purpose, based upon personal prejudices against homosexuals. Under these circumstances, the defendant is not entitled to the defense of qualified immunity.

There are a few other matters present in the case which deserve some brief mention here. The defendant argues, without any great forcefulness, that the plaintiff's constitutional claims should be dismissed since the rights implicated are not stated with precision and clarity. The court finds this argument is without merit. The plaintiff's equal protection claim is stated clearly enough for any reasonable person to understand the nature and context of the grievance asserted and the nature of the right implicated. And certainly, the defendant has no problem in apprehending the nature of the plaintiff's claim and proceeds to discuss the arguments relating to the

plaintiff's equal protection claim in detail elsewhere in his briefs to the court.

The Defendant also argues that the plaintiff's claim against him in his official capacity should be dismissed. The defendant argues that he did not have decision-making authority in job hiring, and therefore is not subject to any liability for actions in his official capacity pursuant to Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989).[6]

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6 During the hearing of the present matter, the defendant also stressed the relevance of Ware v. Unified School Dist. No. 492, 902 F.2d 815 (10th cir. 1990). In Ware the Tenth Circuit discussed the circumstances under which a school board might be held liable for actions taken by a subordinate official. Of course, the impact of the defendant's argument is limited to the plaintiff's claim against Muci in his official capacity; even if the defendant were correct, it would not eliminate the plaintiff's claim against Muci in his individual capacity. Here, the

The defendant's argument fails in its factual premise. It is correct that the district personnel office does have some input in the hiring process, and yes, the applicants for a job must first meet district-created job qualifications. The principal's discretion in hiring is not unfettered.

Nevertheless, the facts indicate that the decision by the principal is given great weight, and in virtually all circumstances is normally decisive. Ultimate hiring

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6.plaintiff has brought his claim only against the school official, not the school board. The secondary or derivative liability of the school board is not in issue. The Jett standards used to determine "the responsibility of the school district for the actions of a principal" are relevant only to the actions against Muci in his official capacity. 1005 L.Ed.2d at 628. As noted above, the plaintiff has demonstrated that the defendant is the agent responsible for the determination not to hire.

decisions rarely conflict with the decision of the school principal. More importantly, and aside from considerations relating to the district's hiring policies in general, there is no evidence in the present case that any other officer or agent of the school district participated in any way in the specific decision to hire Silverthorne and not to hire Jantz. The only person demonstrated to have been involved in the decision is the defendant Muci. That failure to interfere with the decision of the principal is wholly consistent with the effective, established policy of the district. The argument that Muci had little to do with the decision not to hire Jantz cannot be accepted in light of the evidence

currently before the court and the relevant standards to be used in resolving the defendant's motion for summary judgment. The plaintiff's equal protection claims against Muci, in both his individual and his official capacities, may proceed.

Finally, the plaintiff also advances claims for invasion of constitutional rights to privacy and freedom of association. Most of the arguments advance by the plaintiff in relation to these claims substantially duplicate those in the plaintiff's equal protection claim. The plaintiff fails to adequately articulate the nature of the asserted privacy and free association claims, and accordingly summary judgment will issue against the same.

IT IS ACCORDINGLY ORDERED

this 29 day of March, 1991, that the defendant's motion for summary judgment (Dkt. No. 21), granted as it relates to the plaintiff's privacy and free association claims; in all other respects, the motion is hereby denied.

/S/ _____
PATRICK F. KELLY, JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VERNON R. JANTZ,
Plaintiff-Appellee

v.

CLEOFAS F. MUCI,
Defendant-Appellant

No. 91-3245

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION OF KANSAS NATIONAL CONFERENCE OF GAY AND LESBIAN ELECTED OFFICIALS,
Amicus Curiae,

ORDER

Filed December 14, 1992

Before McKay, Chief Judge, BARRETT, LOGAN, SEYMORE, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges, and PARKER, District

Judge.*

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. The court having polled on the suggestion for

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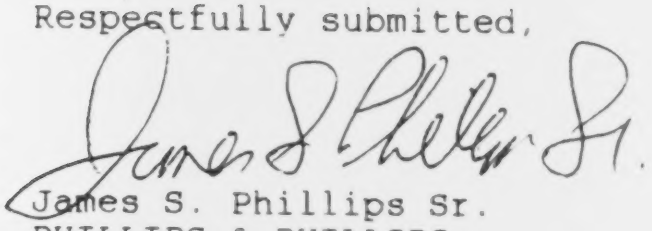
* The Honorable James A. Parker, United States District Judge for the District of New Mexico, sitting by designation.

rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Chief Judge McKay and Judge Seymore would grant rehearing en banc and Judge Logan recusing.

Entered for the Court

/S/ _____
ROBERT L. HOECKER, Clerk

Respectfully submitted,



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